IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASMINE VAIRD, et al.	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	NO. 99-2727

MEMORANDUM AND ORDER

BECHTLE, J. MAY , 2000

Presently before the court is defendant the School District of Philadelphia's ("Defendant") motion for summary judgment and plaintiff Jasmine Vaird, et al.'s ("Plaintiff") response thereto. For the reasons set forth below, the court will grant the motion.

I. BACKGROUND

In the 1998-1999 school year, both Plaintiff and Latifah Thomas ("Thomas")[1] were female second grade students enrolled at the Francis D. Pastorius Elementary School, a public school in the School District of Philadelphia serving the kindergarten through fifth grades. (Compl. ¶ 9.) In September 1998, Plaintiff was seven years old and Thomas was eight. Plaintiff alleges that on September 18, 1998, Thomas sexually assaulted her.[2] Plaintiff asserts that, later that same day, while in the

[1] Various exhibits refer to "Latiafha" rather than "Latifa" Thomas. Because the moving and responsive papers and the Complaint refer to "Latifa Thomas" the court will follow this spelling of the name.

[2] Plaintiff's Complaint states that Thomas "pulled down [Plaintiff's] pants and panties and forcefully put her finger into her vagina." (Compl. ¶ 19.)

schoolyard, Thomas punched Plaintiff in the face. (Compl. ¶ 19.)

On September 23, 1998, Plaintiff's mother reported the assault to the school principal, Dr. Elvedine Wilkerson ("Wilkerson"), and filed a complaint with the school district. That same day, Wilkerson investigated the incident, called the police, suspended Thomas for five days and transferred Thomas out of Plaintiff's classroom. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2.) Wilkerson also agreed to transfer Thomas to another school. Id. However, because Plaintiff's parents intended to transfer Plaintiff to another school, Wilkerson stopped the process for transferring Thomas. Id.

In October 1998, Plaintiff's mother again reported to Wilkerson, asserting that Plaintiff and Thomas were in the same reading group, that Thomas was "bothering" Plaintiff and that on October 28 and 29, 1998, Thomas kicked Plaintiff.[3] (Compl. 21 & 23.) In response, Wilkerson suspended Thomas for two days and transferred her to another reading group. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2.) Also, because Plaintiff had not yet transferred to another school, Wilkerson re-instituted transfer proceedings for Thomas.[4] Id.

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[3] Defendant asserts that when questioned by Wilkerson, Thomas claimed that she kicked Plaintiff's chair rather than Plaintiff. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2.)

[4] Thomas' transfer could not be effected because no spaces were available in age-appropriate classes in schools near her home. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 3.) Plaintiff transferred to Muhlenberg Elementary School in the Allentown School District for the 1999-2000 school year.

Plaintiff filed her Complaint on May 27, 1999, alleging a violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681 et seq. ("Count I"), a violation of 42 U.S.C. § 1983 ("Count III") and requesting punitive damages ("Count II"). On September 20, 1999, the court dismissed Counts II and III of Plaintiff's Complaint with prejudice.[5] Defendant filed a motion for summary judgment on the remaining Title IX claim on December 17, 1999. Plaintiff filed a response on January 3, 2000.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a

[5] On July 28, 1999, Defendant filed its Motion to Dismiss Counts II and III of Plaintiff's Complaint, with prejudice. On or about August 3, 1999, Plaintiff's counsel advised the court by letter that he did not oppose the Motion to Dismiss Counts II and III, so long as they were dismissed without prejudice. The court issued an Order dated August 13, 1999, stating that because dismissal with prejudice was opposed, Plaintiff should file a response to Defendant's motion within 15 days. Plaintiff did not file a response to Defendant's motion.

reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Plaintiff's claim for monetary damages arises under Title IX, alleging student-on-student sexual harassment. Title IX provides: "[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

In Davis v. Monroe County Board of Education, the Supreme Court held that a private damages action may lie against a school board in cases of deliberate indifference to known student-on-student sexual harassment. Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1671 (1999) (stating that "in certain limited circumstances" private damages action may lie). The Court held that recipients of federal funds may be "properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said

to deprive the victims of access to the educational opportunities or benefits provided by the school." Id. at 1675.

In Davis, the Court emphasized that "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." Id. at 1670. The recipient must "intentionally act[] in clear violation of Title IX by remaining deliberately indifferent to acts . . . of which it had actual knowledge." Id. at 1671 (citations omitted). This deliberate indifference must itself "cause[]" the discrimination. Id. (citations omitted). This "high standard" is necessary to "eliminate any risk that the recipient would be liable in damages not for its own official decision" but instead for another's "independent actions."[6] Id. (internal citations and quotations omitted). To avoid liability, the Court stated that the funding recipient "must merely respond to known peer harassment in a manner that is not clearly unreasonable" and that liability would be found only where the recipient's response, or lack thereof, is "clearly unreasonable in light of the known circumstances."[7] Id. at 1674.

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[6] The Court stated that "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference subjects its students to harassment. That is, the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." Davis, 119 S.Ct. at 1672 (internal quotations and citations omitted).

[7] Whether gender-oriented conduct rises to the level of actionable harassment:

> depends on a constellation of surrounding circumstances, expectations, and relationships including, but not limited to, the ages of the harasser and the victim and the number

In Davis, the sexual harassment involved fifth graders and continued over a period of five months. The incidents included "numerous acts of objectively offensive touching" and ultimately led to a student pleading guilty to criminal sexual misconduct. Davis, 119 S.Ct. at 1676. In Davis, the school board "made no effort whatsoever either to investigate or to put an end to the harassment" despite the fact that the harassment was reported to

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> of individuals involved. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages . . . are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis, 119 S.Ct. at 1675 (citations and internal quotations omitted). The Court added that:

> [a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a "widespread level" among students.

Id. at 1676.

classroom teachers, the school principal and the physical education teacher.[8] Id. at 1667 & 1676.

Thus, in cases that do not involve an official policy of the recipient entity,[9] damages will not lie under Title IX unless the defendant has "actual knowledge" of the discrimination and "fails to adequately respond." Gebser v. Lago Vista Indep. Sch. Dist., 118 S.Ct. 1989, 1999 (1998). The response must amount to "deliberate indifference." Id. In the instant case, the court finds that a reasonable jury could not conclude that Defendants were deliberately indifferent to sexual harassment, of which they had actual knowledge, that was so severe, pervasive, and objectively offensive that it can be said to deprive Plaintiff of access to the educational opportunities or benefits provided by the school. See Davis, 119 S.Ct. at 1675. The court also finds that Defendant's response to Plaintiff's allegations was not, as a matter of law, clearly unreasonable. The court will address the notice element and Defendant's response to Plaintiff's

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[8] In Davis, school personnel took no disciplinary action, made no effort to separate the students and failed to "respond in any way over a period of five months" to the plaintiff's and other female students' complaints. Davis, 119 S.Ct. at 1674. The Court found that questions remained as to whether the school board's response to the misconduct was unreasonable. Id.

[9] In her Complaint, Plaintiff alleges that Defendant "failed to create appropriate policies" regarding "students being alone with one another in the bathroom." (Compl. ¶ 16.) However, the record shows that Defendant has an established policy on sexual harassment, publishes it to all students in the school district and instructs personnel on how to respond to peer sexual harassment. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 15 & Ex. 2.)

allegations separately.

In Gebser, the Court found that the school district's actual notice of a teacher's inappropriately suggestive comments made during class "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." 118 S.Ct. at 2000. Thus, it is clear that actual notice requires more than a simple report of inappropriate conduct by a teacher. In Davis, where the hostile environment arose out of a male student's repeated harassment of a female student, the Supreme Court suggested that the actual notice standard was satisfied by repeated reports of the harassing conduct to teachers and the principal by both the student and her mother. Davis, 119 S.Ct. at 1676.

Plaintiff asserts that Defendant knew of Thomas' "sexual propensity toward assaulting her female classmates." (Compl. ¶ 11.) There is, however, no evidence of any prior inappropriate behavior by Thomas. Plaintiff alleges that Defendant had notice "prior to September 18, 1998" because it "received complaints about young girls doing something 'nasty'" in the girls' restroom. (Compl. ¶ 12.) In support of this assertion, Plaintiff points to the second page of the Serious Incident Report that was developed in response to the September 18th incident between Thomas and Plaintiff. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 14.) According to this report, Wilkerson had asked a classroom assistant, Mercedes Burgess, whether another child (Nijah Dunbar) had told Burgess about girls

doing something "nasty" in the girls' room. (Compl. Ex. A.) Burgess did not recall the incident, but stated that she "often calls in the bathroom to tell children to come out and go to their classrooms." Id. Plaintiff offers nothing else to suggest that Defendant had actual notice. Viewing the evidence in the light most favorable to Plaintiff, the court finds that no reasonable jury could conclude that Defendant had actual knowledge of sexual harassment prior to the September 18, 1998 incident.

In addition to establishing actual notice, Plaintiff must also present evidence that the response of school officials was clearly unreasonable and rose to the level of deliberate indifference. This requirement protects schools from liability under Title IX when they take "timely and reasonable measures" to end harassment. Doe v. School Adm. Dist. No. 19, 66 F. Supp. 2d 57, 64 (D. Me. 1999) (citations omitted).

The record shows that the response of school personnel to the alleged sexual harassment was immediate. On September 23, 1998, when Plaintiff's mother reported the alleged assault to the school principal, Wilkerson assigned the girls to different classrooms, called the police, suspended Thomas for five days and transferred Thomas out of Plaintiff's classroom. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2.) The school principal also agreed to transfer Thomas to another school. Id.

In October 1998, when Plaintiff's mother reported that Plaintiff and Thomas were in the same reading group and that

Thomas kicked Plaintiff on October 28 and 29, Wilkerson suspended Thomas for two days and transferred her to another reading group. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2.) Additionally, because Plaintiff had not yet transferred to another school, Wilkerson re-instituted transfer proceedings for Thomas. Id. Plaintiff presents no evidence showing that any further incidents occurred. The court concludes, as a matter of law, that Defendant's response to Plaintiff's allegations was not "clearly unreasonable." Davis, 119 S.Ct. at 1674.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment will be granted.

An appropriate Order follows.

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SCHOOL DISTRICT OF PHILADELPHIA	:	NO. 99-2727

ORDER

AND NOW, TO WIT, this day of May, 2000, upon consideration of defendant the School District of Philadelphia's motion for summary judgment and plaintiff Jasmine Vaird, et al.'s response thereto, it is hereby ORDERED that said motion is GRANTED. Judgment is entered in favor of defendant the School District of Philadelphia and against plaintiff Jasmine Vaird, et al. on all counts.

LOUIS C. BECHTLE, J.